90-947

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ELLING O. EIDE,

Petitioner,

vs.

SARASOTA COUNTY,
a political subdivision of
the State of Florida,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erred when it failed to give any weight to the findings of fact made by the United States District Court for the Middle District of Florida, where the lower court's findings were based upon full review of evidence and argument by counsel, and where this Court's decisions and Federal Rule of Civil Procedure 52(a) require that the Court of Appeals only reverse findings of fact of the trial court when clearly erroneous?

2. Whether the Court of Appeals for the Eleventh Circuit deprived Eide of his right to redress in the Federal courts, under 42 U.S.C. § 1983, for the deprivation of his constitutional rights by deciding, based on its view of the facts, that the final adoption by Sarasota County of a "Sector Plan" was not sufficiently final to support the Federal Court's hearing of Eide's § 1983 claim?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Eleventh Circuit were petitioner Elling O. Eide and respondent Sarasota County, a political subdivision of the State of Florida.

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ELLING O. EIDE,

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vs.

SARASOTA COUNTY,
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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Elling O. Eide petitions that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 8, 1990.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit (Appendix, infra, 1, 13) are reported at 895 F.2d 1326 and 908 F.2d 716.

The unreported judgment and order of the United States District Court for the Middle District of Florida, entered on May 23, 1988, are reprinted in the Appendix at 40 and 41. The order of the United States District Court for the Middle District of Florida on the County's motion for judgment notwithstanding the verdict or, in the alternative, for new trial is reprinted in the Appendix at 43. The findings of fact of the United States District Court for the Middle District of Florida, in connection with the County's motion for directed verdict, are reprinted in the Appendix at 45.

JURISDICTION

On August 8, 1990, a panel of the Court of Appeals for the Eleventh Circuit decided Sarasota County v. Elling O. Eide, Case No. 88-3700 (Appendix 13). On September 13, 1990, the Court of Appeals for the Eleventh Circuit denied petitioners' timely petition for rehearing (Appendix 39). This Court has jurisdiction to review the final decision of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Constitutional provision involved is the Fourteenth Amendment to the United States Constitution, the relevant portions of which are reproduced in the Appendix at 70.

The statute principally involved in the decision of the Eleventh Circuit Court of Appeals is 42 U.S.C. § 1983, the relevant portions of which are reproduced in the Appendix at 71.

STATEMENT OF THE CASE

Preliminary Statement

Congress enacted 42 U.S.C. § 1983 "to interpose the federal courts between the States and the people, as guardians for the people's federal rights, to protect the people from unconstitutional action under color of state law, 'whether the action be executive, legislative or judicial.' " *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting from *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). The Court of Appeals for the Eleventh Circuit (the "Court of Appeals") ignored the trial court's findings of fact, this Court's precedents, and Fed. R. Civ. P. 52(a).[1] By independently deciding facts, the Court of Appeals prevents the

[1] Rule 52(a) provides in pertinent part that "[f]indings of fact . . . shall not be set aside unless clearly erroneous. . . . "

petitioner, Elling O. Eide ("Eide"), from bringing his constitutional claim to Federal Court. This emasculates § 1983 and frustrates the statute's very purpose.

The District Court's Decision

Eide presented the facts of his claim to the district court.[2] Eide claimed that his constitutional rights had been violated by an unconstitutional application of Florida's relatively new land use laws to his property.[3] The district court found facts, based upon ten days of trial, thousands of pages of documentary exhibits, the testimony of 27 witnesses, detailed knowledge of Florida land use law and presentation by able counsel on both sides of the case. Based upon these findings the trial court found that (1) Sarasota County's ("the County") adoption of the sector plan which designated Eide's land residential was a final decision as to the zoning for which the land was eligible, (2) any further effort by Eide to restore commercial development rights for his property would be futile and (3) Eide's claims were ripe for adjudication.

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[2] Eide is a former professor of Chinese. He owns a family homestead in Sarasota County passed down from his grandfather. He also owns two separate parcels, formerly zoned commercial, which are at issue in this lawsuit. Eide has always planned to use income from the formerly commercially zoned property to fund the development of a Chinese studies center on his family homestead. [R.4, pp. 26-30, 57-58]

[3] *See*, Fla. Stat. § 163.3194 (Supp. 1989) (comprehensive plan for land development is binding), reproduced in Appendix at 72.

The Court of Appeals' Decisions

On March 8, 1990, the Court of Appeals, upon a *de novo* review of the district court's factual findings concerning futility and finality, reversed the district court's judgment and ignored its findings. Eide moved for rehearing.

On August 8, 1990, the Eleventh Circuit withdrew its earlier opinion and substituted an opinion which rendered the same result and also ignored the district court's factual findings. The second opinion noted that "[d]ecisions on ripeness issues are fact-sensitive," 908 F.2d at 727, but reversed because "we are not convinced . . . that it would be futile for Eide to pursue commercial zoning", 908 F.2d at 726 n. 17, and because "we are not satisfied . . . that the County would not grant [Eide] commercial zoning if he applied for rezoning." 908 F.2d at 727. The second opinion "found" that Eide's claims were not ripe. 908 F.2d at 718.

One member of the panel disagreed with the Court of Appeals' ripeness holding. Judge Shoob[4] noted that the panel decision did not defer at all to the trial court's factual determinations. He noted that after reviewing the facts the district court concluded that adoption of the sector plan was "tantamount to an adverse zoning decision" and that "the district court further found . . . that

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[4] Honorable Marvin H. Shoob, U.S. District Judge for the Northern District of Georgia, sat on the panel by designation and wrote a concurring opinion critical of the panel's failure to apply the clearly erroneous standard to its review of the district court's findings.

any attempt to obtain a more favorable zoning decision would be futile." 908 F.2d at 727-728.

Judge Shoob stated that the Court of Appeals should not "disturb lightly the conclusions of the district court, which is infinitely more knowledgeable about the practical realities in this case" and instead "substitute its detached view of whether further participation in the zoning process would be futile for the informed findings of the trial court." *Id.* at 728.

On March 8, and August 8, 1990, the Court of Appeals ignored the district court's findings, this Court's decisions, and Fed. R. Civ. P. 52(a), by deciding both times that the case was not ripe for review. *See*, Opinions at 895 F.2d 1326; 908 F.2d 716.

On September 13, 1990, the panel denied Eide's timely petition for rehearing.

The Underlying Dispute

On June 30, 1981, the County adopted a statutorily mandated Comprehensive Plan "to control and direct the use and development of property within a county or municipality." *Machado v. Musgrove*, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987) (citations omitted), *adopted en banc*, 519 So.2d 636 (Fla. 3d DCA), *review denied*, 529 So.2d 693 (Fla. 1988). Under Florida law all development in the County must be consistent with this plan. Fla. Stat. § 163.3194 (Supp. 1989). On September 16, 1986, as required by the Comprehensive Plan, the County adopted a site-specific "sector plan" for approximately 10 parcels of land at the intersection of U.S. 41 and Beneva Road in

Sarasota County.[5] The sector plan designated Eide's 14- and 19-acre parcels as residential. The County's decision isolated Eide's land as the only land restricted to residential in more than six miles of commercial development on U.S. 41.

On September 26, 1986, Eide filed a complaint for damages, declaratory judgment and injunctive relief in the District Court for the Middle District of Florida. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3)(4). The County answered, raising ripeness, among other affirmative defenses.

The County moved for summary judgment twice. The County's second motion raised ripeness as a ground for dismissal. Eide filed affidavits in response to the County's motions for summary judgment and the district court denied the County's motions. The case proceeded to a 10-day jury trial. The district court specifically found that based upon the evidence at trial any request to rezone the 14- and 19-acre parcels to commercial would be "futile." [Appendix at 45-49.]

The jury found that restricting Eide's properties to residential deprived him of equal protection (because the County treated Eide's properties differently than similarly situated properties) and due process (because restricting Eide's properties to residential bore no substantial relationship to the public health, safety and welfare and was clearly arbitrary and unreasonable).

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[5] U.S. 41 is the primary commercial corridor in Sarasota County. The corner of U.S. 41 and Beneva Road is the primary commercial intersection in the County.

The County filed post-trial motions, again arguing that the case was not ripe. The district court denied the County's post-trial motions, noting that ripeness "was explicitly raised, considered, and ruled upon at trial." [Appendix at 43.]

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted To Instruct The Circuit Courts Of Appeals To Uphold District Courts' Findings Of Fact In Constitutional Cases Unless Clearly Erroneous, As Required By This Court's Decisions And Federal Rule Of Civil Procedure 52(a).

The Court of Appeals ignored the district court's factual findings when it reviewed the factual record in this case, except to say that it "disagreed" with them. 908 F.2d at 720.[6]

This Court should summarily reverse the Court of Appeals for failing to apply the clearly erroneous test to the district court's decision in this case. *See e.g., County of Los Angeles v. Kling*, 474 U.S. 936 (1985). The Court of Appeals in this case engaged in appellate fact finding and thereby has denied Eide his right to redress under 42 U.S.C. § 1983.[7]

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[6] *See also* 908 F.2d at 727-28 (Shoob, J., concurring) (majority demonstrates lack of deference to the district court's factual findings).

[7] *See Amadeo v. Zant*, 486 U.S. 214, 224-226 (1988) (and cases cited); *Maine v. Taylor*, 477 U.S. 131, 140 (1986) (and cases cited); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-716 (1986) (and cases cited); *Anderson v. Bessemer City*, 470 U.S. 564, 573-576 (1985) (describing clearly erroneous review generally) (and cases cited).

Federal Rule of Civil Procedure 52(a) requires that the Court of Appeals uphold the district court's factual determinations unless clearly erroneous. This Court has repeatedly reversed the Circuit Courts of Appeals for failing to apply this standard or for not giving the district courts due deference. *See, Amadeo v. Zant*, 486 U.S. 214, 228 (1988) (even a district court's "lack of precision . . . is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate fact finding") (citations omitted).

Eide presented his factual case to the district court, including extensive evidence that the County's decision was final, that pursuing rezoning to commercial was futile and that, based upon the facts, the case was ripe for adjudication. The Court of Appeals reviewed these issues *de novo*.[8] Eide should not be expected to again prove his factual case before the Eleventh Circuit. *See, Maine v. Taylor*, 477 U.S. at 131 ("appellate courts are not to decide factual questions *de novo*, reversing any finding they would have made differently") (and cases cited).

Ignoring the dictates of Rule 52(a) undercuts the federal courts' continuing struggle for judicial efficiency, the trial court's expertise developed over time, and the

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[8] The Majority wrote, "we are not convinced that the facts of this case demonstrate that it would be futile for Eide to pursue commercial zoning," 908 F.2d at 726 n. 17, and that "we are not satisfied . . . that the County would not grant [Eide] commercial zoning if he applied for rezoning." 908 F.2d at 727. The Court does not, anywhere in the opinion, state the basis for its conclusion or the standard it applies to review the district court's findings. *See e.g., Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

oft-recognized importance of first hand observation.[9] *Maine v. Taylor*, 477 U.S. at 145 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574-575 (1985)). Not only does the panel's decision in this case conflict with this Court's often and clearly stated rules and create inefficiencies in the court system, it would be unfair to the parties. *See, e.g., Anderson*, 470 U.S. at 575.

The rule against *de novo* review is so well established that this Court has summarily reversed courts of appeal going beyond the clearly erroneous review. In *County of Los Angeles v. Kling*, this Court, with two sentences, granted *certiorari* and summarily reversed the Court of Appeals' judgment where the Court of Appeals failed to

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[9] Two examples of how the trial court's expertise was ignored by the Court of Appeals stand out. *First*, the Court of Appeals quotes a statement by the County Commission chairman that "[c]ommercial in that area is not part of the Sector Plan, but that doesn't stop the Board from reversing the staff recommendation," completely out of context. The statement was made in response to Eide's presentation *before* the sector plan was adopted by that same County Commission. The Court of Appeals' argument, that the sector plan was not a final decision on zoning, was based in large part on this statement. 908 F.2d at 727. The Court of Appeals misread the record and thereafter incorrectly found facts while ignoring the work of the trial court. The district court had specifically found that "the sector plan was actually adopted. The comprehensive zoning plan was actually adopted. We're not going on just a recommendation" [Appendix at 47]. *Second*, the Court of Appeals assumed (correctly) that there was a 75-acre cap on allowable commercial acreage, 908 F.2d at 719 n. 2, but it never went on to explain how Eide was to overcome the fact that all of the allowable acreage had been irreversibly assigned to other parties. Again, the district court's familiarity with the facts was simply ignored.

properly review the district court findings in accordance with the clearly erroneous standard of Rule 52(a). 474 U.S. 936 (1985) (citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985)).

The district court's findings were not clearly erroneous. The district court found that Eide's property could not be zoned commercial. Such a designation would conflict with the sector plan. [Appendix at 45-48.]

The district court's findings that there was a final decision, that it was futile to pursue rezoning to commercial, and that this case was ripe for review were well supported. The trial judge, hearing testimony and reviewing evidence during a ten day trial, found that the sector plan had one purpose: to decide which properties could have commercial zoning.

The district court understood that the sector plan here was not a general guideline, but rather was mandatory and site specific, the equivalent of a site specific zoning decision. [PX 3, p. 361; PX 8A, p. 8; R. 9, p. 23] The district court similarly understood that the sector planning process, not the subsequent rezoning process, was when the landowner should present his arguments and evidence for commercial designation. The district court understood that Eide did so at no fewer than ten hearings. [PX 3A; PX 124; PX 125; PX 126]

The sector plan here was designed to control development on site specific parcels for 20 years. [PX 8A, p. 68; R. 6, pp. 103, 104, 126] The district court accepted the County planner's testimony at trial that sector plans

determined what property in the sector would be commercial. [R. 9, pp. 23, 110; PX 9, p. 9] No parcel within the sector could be rezoned to a zoning category inconsistent with the sector plan designation. [PX 3, pp. 361-363]

The district court understood that state law requires a comprehensive plan, that the sector plan is part of the comprehensive plan, and that after the plans are adopted, the County is "required" to apply the plans "to all property." Florida Statutes 163.3194 and 163.3215, Sarasota County Code 25-5,[10] the County Comprehensive Plan,[11] the sector plan, the County resolution approving the sector plan, and case law required that any rezoning be consistent with the *residential* designation of Eide's properties. (*See, e.g., McGraw v. Metropolitan Dade County*, 529

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[10] The Code states in pertinent part:

> [N]o development order shall be approved for property within the boundaries of an adopted sector plan unless the development order is consistent with the adopted sector plan.

Sarasota County Code, § 25-5(f). "Consistency" is defined as:

> [N]ot inhibiting or obstructing the attainment of the goals and policies contained in the sector plan.

Sarasota County Code, § 25-5(b)(1).

[11] The Comprehensive Plan provides:

> [O]nce a sector plan has been developed . . . [i]t would serve as the master plan for the development of those particular areas. . . . That is, proposals which are inconsistent with the sector plan or "master plan" would require the approval of an amendment to the [sector] plan before the proposal could, in turn, be approved by the Board of County Commissioners.

So.2d 1190 (Fla. 3d DCA), *review denied*, 538 So.2d 1255 (Fla. 1988); *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *adopted en banc*, 519 So.2d 636 (Fla. 3d DCA), *review denied*, 529 So.2d 693 (Fla. 1988); *City of Cape Canaveral v. Mosher*, 467 So.2d 468 (Fla. 5th DCA 1989)).

A district court judge familiar with ten days of trial testimony and thousands of pages of exhibits, familiar with Florida law, and familiar with sector plans, found that the County's decision was final, that any attempt by Eide to seek rezoning was futile and that Eide's § 1983 action was properly before the Court. As pointed out more fully in Eide's petition for rehearing (Appendix at 51), the Court of Appeals erred in reversing the district court's findings.

II. The Writ Should Be Granted Because The Court Of Appeals' Decision Deprives Eide Of The Constitutional Protections Afforded By 42 U.S.C. § 1983.

To allow the Court of Appeals' decision to stand works an injustice on Eide and deprives him of fundamental constitutional rights. No one disputes that Eide brought a 42 U.S.C. § 1983 action claiming that he had been denied equal protection of the law and due process of law under the U.S. Constitution. For this claim to be ripe Eide need only show a decision from which it would be futile to appeal. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573-1576 (11th Cir. 1989).

Because the district court made early and favorable findings on finality and futility, Eide had no reason to prove further that the decision was final or that pursuing

rezoning would be futile.[12] *See generally, Hartford Accident & Indemnity Co. v. Gulf Insurance Company,* 837 F.2d 767 (7th Cir. 1988) (in different context, court notes "it is unrealistic to expect counsel for a plaintiff who has just won to ask the court for leave to present further evidence in case the court's legal theory is wrong").

To require Eide's attorneys to proceed to again prove his factual case before the Court of Appeals after having already proved it in the trial court is inappropriate and unrealistic. "[T]he trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Anderson v. Bessemer City,* 470 U.S. 564, 575 (1985) (quoting *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977)).

Here, the Court of Appeals took away Eide's federal means of redressing a violation of his Constitutional right on "factual rather than legal grounds." *Amadeo v. Zant,* 486 U.S. 214, 223 (1988).[13] The Court of Appeals' decision particularly undermines Section 1983 because, the more easily and quickly the district court finds a clear civil rights violation, the more easily the Court of Appeals may reverse because it was not "satisfied" or "convinced" that the plaintiff had proved his case.

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[12] Even if Eide could have anticipated the Court of Appeals' astonishing belief that sector plans merely make recommendations, it would have been difficult for him to continue to introduce evidence on finality after the district court had found that pursuing rezoning would be futile and that sector plans make final decisions.

[13] And, like the Court of Appeals in *Amadeo,* the Court of Appeals here never identified the standard of review that it applied to the district court's factual findings. *See, Amadeo,* 486 U.S. at 223.

This Court should grant this Writ to enforce the Rule that the Circuit Courts of Appeals cannot reverse findings of the district courts unless clearly erroneous and to prevent Eide's constitutional rights from being abused without redress.

CONCLUSION

For the reasons discussed above, a writ of *certiorari* should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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Elling O. EIDE, Plaintiff-Appellee,

v.

SARASOTA COUNTY, a political subdivision of the State of Florida, Defendant-Appellant.

No. 88-3700

United States Court of Appeals, Eleventh Circuit.

March 8, 1990.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and COX, Circuit Judges, and SHOOB*, District Judge.

ANDERSON, Circuit Judge.

The issue in this case is whether a landowner's contentions that Sarasota County violated his equal protection and substantive due process rights are ripe for decision.[1] We find that the plaintiff's claims are not ripe.

I. FACTUAL BACKGROUND

Florida's land use planning statutes provide for the adoption of comprehensive plans "to control and direct

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*Honorable Marvin H. Shoob, U.S. District Judge for the Northern District of Georgia, sitting by designation.

[1] Sarasota County has raised a number of other grounds on appeal. However, because we dispose of this case on ripeness grounds, we need not consider the County's other arguments.

the use and development of property within a county or municipality." *Machado v. Musgrove*, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987) (citations omitted), *adopted en banc*, 519 So.2d 629 (Fla. 3d DCA), *review denied*, 529 So.2d 693, 694 (Fla.1988). Once a comprehensive plan for an area is adopted, all development approved by a governmental agency must be consistent with the plan. Fla.Stat. § 163.3194 (Supp.1989).

On June 30, 1981, Sarasota County (the "County") adopted a statutorily mandated comprehensive plan ("Apoxsee") to map out the future development of land in the County. This comprehensive plan identified various areas as "village activity centers, "community centers," and "town centers." Village activity centers are permitted to have approximately 75 acres of commercially zoned land while community centers may have 125 acres in commercial use.[2] Town centers are permitted to have variable commercial acreage with no upper limit on the amount of commercially zoned land. Centers where less than 50% of the acreage is commercial are authorized to adopt sector plans "to determine future commercial land-use allocations to support future population growth in the area" R9-110. In order for property included in a sector plan to be rezoned, the proposed rezoning and development plans have to be consistent with

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[2] At trial, there was testimony that the 75 acres permitted for a village activity center was simply a guideline, not a cap on the amount of commercial acreage permissible. R5-65. However, the possibility of a flexible amount of commercial acreage is not vital to our holding, and we assume that the 75 acres allotted for village activity centers and the 125 acres allotted for community centers are caps.

both Apoxsee and the sector plan. Adoption of a sector plan does not change the zoning of any of the properties involved.

Elling Eide, the appellee, owns two parcels of land – one of approximately fourteen acres (the "14-acre parcel") and the other of approximately nineteen acres (the "19-acre parcel") – which are situated west of U.S. 41 about five miles south of the city limits of the City of Sarasota in Sarasota County. Eide also owns a parcel east of U.S. 41 which he leases to developers who have transformed it into a Kmart shopping center. Apoxsee designates this area as a village activity center around a regional center (the Sarasota Square Mall). Prior to the development of a sector plan for this area, the 19-acre parcel was zoned RSF-2 (residential, single family, 3.5 units/acre), and the 14-acre parcel was zoned RMF-2 (residential, multi-family, 9 units/acre).

In 1984 another property owner in the area requested permission from Sarasota County to prepare a proposed sector plan. Eide discovered that the sector plan included his 14-acre parcel but not his 19-acre parcel. After a County official informed Eide that inclusion in the sector plan was the only way that his properties would be considered for commercial zoning in the future, he asked that the sector plan boundary be amended to include his larger property as well. The County amended the sector plan boundary as per his request.

In 1986, because Eide wanted to take advantage of the favorable capital gains tax law, he complained that the landowners who were preparing the sector plan were taking too long; at his request, the County's professional

planning staff undertook the completion of the plan. The completed sector plan identified three possible alternatives for future zoning; two of these alternatives recommended some of Eide's property for commercial development, while the third would have zoned all of Eide's property residential (with the exception of the Kmart parcel). The sector plan's final recommendation adopted a hybrid of two of the alternatives; however, it recommended that Eide's parcels continue to be zoned residential. The sector plan also indicated that an amendment to Apoxsee designating the area as a community or town center would be appropriate in the future; however, the plan suggests that future commercial development should be located east of U.S. 41, and Eide's parcels are located to the west of 41. Sector Plan 84-2, pp. 47-48, 64, 93. On September 16, 1986, the County adopted the sector plan.

Before the completion of the sector plan, Eide filed a petition for the rezoning of his 14-acre parcel. However, a traffic study was required to accompany all rezoning petitions. The County's planning staff returned the petition to Eide for a required traffic impact analysis; Eide then voluntarily withdrew his petition. Eide never requested that the 19-acre parcel be considered for rezoning.

Challenging that the sector plan was unconstitutional as applied to his property,[3] Eide then filed a suit for damages and declaratory and injunctive relief under 42 U.S.C. § 1983 and the Due Process and Equal Protection

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[3] In the district court, Eide abandoned any claim of facial unconstitutionality.

Clauses of the Fourteenth Amendment. Sarasota County raised several defenses to Eide's claims, including a challenge to Eide's assertion that the County had made a final decision concerning his land parcels. The district court rejected this ripeness defense. After a jury trial, Eide was awarded $850,000. In addition, the court ordered the County to grant Eide commercial zoning.

We disagree with the district court's determination that the case was ripe for adjudication. Therefore, we reverse the district court's judgment and order that the section 1983 claims be dismissed as not ripe. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

II. ANALYSIS

The question of ripeness affects our subject matter jurisdiction in this action. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 7 (11th Cir.1989); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989); *Unity Ventures v. Lake County*, 841 F.2d 770, 774 (7th Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n. 2 (D.C.Cir.1976) (per curiam), *cert. denied*. 429 U.S. 1039, 97 S.Ct. 737, 50 L.Ed.2d 751 (1977). The purpose of the ripeness doctrine is to avoid premature judicial review of local decisions, particularly in an area such as zoning where the courts must be careful not to usurp local authority. In *Williamson County*, the Supreme Court held that a Section 1983 claim involving a regulatory taking of property in violation of substantive due process is not ripe for review until the plaintiff shows that the local

authority has reached a final decision regarding the application of the regulation to the plaintiff's property.[4] 473 U.S. at 199-200, 105 S.Ct. at 3123. The reason for this requirement is found in the test for a successful substantive due process claim. In order to establish a substantive due process claim, the plaintiff must demonstrate that the "regulation [] goes so far that it has the same effect as a taking by eminent domain." *Williamson County*, 105 S.Ct. at 3122. "A court cannot determine whether a regulation

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[4] *Williamson County* held that, in the context of the Just Compensation Clause of the Fifth Amendment, the plaintiff must also show that no state remedy exists to redress the injuries alleged. A showing that no state remedy exists is not required to sustain a claim of deprivation of substantive due process. *Greenbriar, Ltd.*, 881 F.2d at 1574 n. 8 (holding second prong of *Williamson County* ripeness test not applicable in substantive due process context); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir.1989) (holding second prong not applicable for substantive due process claim and first prong not applicable in the context of a physical taking claim), *petition for cert. filed*, 58 U.S.L.W. 3242 (U.S. Oct. 10, 1989) (No. 89-473); *but see Culebras Enterprise Corp. v. Rivera Rios*, 813 F.2d 506, 515 (1st Cir.1987) (for substantive due process claim, exhaustion of state remedies required for ripeness).

On the facts of this case, Eide's equal protection claim is simply another label for his substantive due process claim; thus, we apply the same ripeness standard to both claims. *See Anthony v. Franklin County*, 799 F.2d 681, 686, *reh'g denied*, 804 F.2d 681 (11th Cir.1986); *St. Clair*, 880 F.2d at 202; *Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d 717, 722 (10th Cir.1989); *Herrington v. County of Sonoma*, 857 F.2d 567 at 569 (9th Cir.1988); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir.1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir.1988); *Kinzli v. City of Santa Cruz*, 818 F.2d at 1449, 1455-56 (9th Cir.1987); *Norco Construction v. King County*, 801 F.2d 1143, 1145 (9th Cir.1986).

has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348 n. 8, 106 S.Ct. 2561, 2566 n. 8, 91 L.Ed.2d 285, *reh'g denied,* 478 U.S. 1035, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986). The Supreme Court has interpreted its line of cases: "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 477 U.S. at 351, 106 S.Ct. at 2567.

Several reasons persuade us that Eide's claim is not ripe. First, Eide has neither submitted a development plan to the County nor presented the County with a petition for rezoning, and, therefore, the County has not had the opportunity to consider the arguments for commercial zoning of Eide's land concretely and independently. Second, the County has not made a determination of the extent of development that would be permitted on Eide's land; thus, we cannot determine if a taking has occurred. In addition, commercial zoning of Eide's parcels may be consistent with the sector plan. Finally, Eide may petition for an amendment to the comprehensive plan to upgrade the area to either a community or town center. This option would enable the County to grant Eide commercial zoning with the additional acreage available.

Eide has not submitted even a single plan for the commercial development of his properties. He has not submitted a petition to rezone his properties from their present residential zoning to either higher density zoning or commercial zoning. As a general rule, the challenging of the application of a zoning plan or ordinance to a

particular property is not ripe until the landowner has submitted a plan for development of his or her property. *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Eide argues that his reasons for wanting his land rezoned commercial were presented to the Planning Commission and to the County during the proceedings which culminated in the adoption of the sector plan. He argues that his reasons were fully considered and rejected by the appropriate decision-making bodies, and thus the decision is final and the instant action is ripe. We reject Eide's argument. We are not satisfied that the consideration of his arguments, as merely a few of the many matters considered as part of the overall plan, would afford either the concreteness or finality required of a final decision.

Again relying on his perception that the County has fully heard, considered and rejected all of his reasons, Eide argues that any further action before the County would be futile, and, therefore, his action is ripe for review. The so-called "futility exception" to the final decision requirement does excuse the repeated submission of development plans where the submission would be futile. *See Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.1988). However, in "as applied" challenges to ordinances and land use plans, the Seventh and Ninth Circuits have held that, "until at least one meaningful application" has been submitted for the local authority's review and application of the zoning regulations, futility is not established and a constitutional challenge to local zoning may not be entertained. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.1987) (citing *Williamson*

County, 105 S.Ct. at 3117 and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. at 2561, 2568 n. 8, 91 L.Ed.2d 285, *reh'g denied*, 478 U.S. 1035, 107 S.Ct. 22, 92 L.Ed.2d 778 (1986), the court held "*at least one* application must be submitted before the futility exception applies." (emphasis in original)); *see Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.1988) (citing *Williamson County* and *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, [830 F.2d 977] (9th Cir. 1987); *Shelter Creek*, 838 F.2d 375, 379 (9th Cir.1988) (holding " 'futility exception' is unavailable unless and until landowner has submitted at least one 'meaningful application' for development of the property"); *Herrington v. Sonoma County*, 834 F.2d 1488, 1494-95 (9th Cir.1987), *as amended*, 857 F.2d 567, 569 (9th Cir.1988) (explaining *Kinzli*'s holding by stating: "a property owner cannot rely on the futility exception until he or she makes at least one meaningful application" and holding that the claim was ripe for adjudication); *but see, Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n. 2 (9th Cir.1983) (stating, in *dicta*, that "as applied" challenge to ordinance may be ripe without submission of development plan if submission would be futile), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983).

There are important reasons supporting the Seventh and Ninth Circuits' requirement of a final decision involving a specific development plan before suit may be filed. Zoning is a delicate area where a county's power should not be usurped without giving the county an opportunity to consider concrete facts on the merits prior to a court suit. Moreover, for a meritorious substantive due process claim, a plaintiff must demonstrate that the

zoning regulation has gone "too far," and the Supreme Court has clearly stated that a case is not ripe until the nature and extent of the permitted development is known. *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. at 351, 106 S.Ct. at 2567. In this case, we do not know the nature and extent of the development which will be permitted.

Eide argues, however, that the sector plan conclusively precludes any possible commercial zoning for his properties, and that this decision has such an adverse effect on the value of his property and his investment-backed profit expectations as to constitute a taking. Assuming that commercial zoning is foreclosed, Eide argues that additional attempts to obtain commercial zoning would be futile. We need not in this case decide whether a final decision denying Eide commercial zoning would render the case ripe,[5] because we are not satisfied that there has been a final decision denying commercial use of his property; in other words, we are not satisfied that further efforts to obtain commercial zoning would be futile. Eide argues that it is obvious that commercial zoning would be inconsistent with the sector plan since the sector plan designates his property as residential. However, Eide's determination of what is inconsistent is not controlling here; the County and the Florida courts are arbiters of what is consistent.

There is a split in Florida state courts over what is meant by the requirement of consistency. In *Southwest*

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[5] For example, even if commercial zoning were foreclosed, high density residential (e.g., high rise condominiums) might be permitted.

Ranches Homeowners Ass'n v. Broward County, 502 So.2d 931 (Fla. 4th DCA 1987), *reh'g denied*, 511 So.2d 999 (Fla.1987), Florida's Fourth District held that a land use plan is not the "sole, controlling document with which subsequent plan elements ha[ve] to comply." Instead, the court required that a county's approval of a land use more intensive than that provided by the land use plan be considered in light of all of the elements of the plan, and not simply rejected on the basis of the land use plan. On the other hand, in *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *adopted en banc*, 519 So.2d 629 (Fla. 3d DCA), *review denied*, 529 So.2d 693, 694 (Fla. 1988), the Third District required strict adherence to the land use plan. Neither of these Florida court decisions are binding in Sarasota County. In addition, during a County Commission hearing introduced at trial, the Commission Chairman stated: "Commercial in that area is not part of the Sector Plan, but that doesn't stop the Board from reversing the staff recommendation." Therefore, since the sector plan did not rezone any land, but rather, it only adopted plans for future rezoning, the County could determine that commercial development of Eide's parcels is consistent with the sector plan and would not violate the 75 acre "cap"; thus, it is premature to determine that such a rezoning would be inconsistent with the plan.

In any event, there is another reason why further attempts to obtain commercial zoning would not be futile. Eide could petition the County for an amendment to the comprehensive plan. The sector plan itself provides for the possibility of upgrading the area to a community or town center; such an amendment of the comprehensive plan would increase the acreage available for commercial

use and could pave the way for a designation of Eide's land as commercial.

Eide argues that it would be futile for him to pursue a comprehensive plan amendment because the County adopted a Planning Commission recommendation that the area not be considered for a comprehensive plan amendment to upgrade it to a community or town center. However, the County had not been presented with such a comprehensive plan amendment, and, therefore, the County has not been given the opportunity to consider such an amendment independently on its own merits.

Eide cites *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir.1989), to support his position that the filing of a comprehensive plan amendment petition would be futile. In *Hoehne*, the court determined that it would be futile to seek a plan amendment after the county involved had amended the plan in "a manner clearly and unambiguously adverse to the application of the landowners." 870 F.2d at 535. *Hoehne* is inapposite in this case because the County here has not taken any action which would be unambiguously adverse to a petition requesting that the area be designated a community or town center.

Decisions on ripeness issues are fact-sensitive. On the particular circumstances of this case and for the foregoing reasons, we conclude that the instant Section 1983 claims are not ripe. Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Elling O. EIDE, Plaintiff-Appellee,

v.

SARASOTA COUNTY, a political subdivision of the State of Florida, Defendant-Appellant.

No. 88-3700.

United States Court of Appeals,
Eleventh Circuit.

Aug. 8, 1990.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and COX, Circuit Judges, and SHOOB*, District Judge.

ON PETITION FOR REHEARING

(Opinion March 8, 1990, 11th Cir., 895 F.2d 1326).

ANDERSON, Circuit Judge:

This case is before the panel on petition for rehearing. The previous opinion in this case, published at 895 F.2d 1326 (11th Cir. 1990), is withdrawn, and the following opinion is substituted in lieu thereof. The petition for rehearing is denied.

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* Honorable Marvin H. Shoob, U.S. District Judge for the Northern District of Georgia, sitting by designation.

The issue in this case is whether a landowner's contentions that Sarasota County violated his equal protection and due process rights are ripe for decision.[1] We find that the plaintiff's claims are not ripe.

I. FACTUAL BACKGROUND

Florida's land use planning statutes provide for the adoption of comprehensive plans "to control and direct the use and development of property within a county or municipality." *Machado v. Musgrove*, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987) (citations omitted), *adopted en banc*, 519 So.2d 629 (Fla. 3d DCA), *review denied*, 529 So.2d 693, 694 (Fla. 1988). Once a comprehensive plan for an area is adopted, all development approved by a governmental agency must be consistent with the plan. Fla.Stat. § 163.3194 (Supp. 1989).

On June 30, 1981, Sarasota County (the "County") adopted a statutorily mandated comprehensive plan ("Apoxsee") to map out the future development of land in the County. This comprehensive plan identified various areas as "village activity centers," "community centers," and "town centers." Village activity centers are permitted to have approximately 75 acres of commercially zoned land while community centers may have 125 acres in commercial use.[2] Town centers are permitted to

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[1] Sarasota County has raised a number of other grounds on appeal. However, because we dispose of this case on ripeness grounds, we need not consider the County's other arguments.

[2] At trial, there was testimony that the 75 acres permitted for a village activity center was simply a guideline, not a cap

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have variable commercial acreage with no upper limit on the amount of commercially zoned land. Centers where less than 50% of the acreage is commercial are authorized to adopt sector plans "to determine future commercial land-use allocations to support future population growth in the area." R9-110. In order for property included in a sector plan to be rezoned, the proposed rezoning and development plans have to be consistent with both Apoxsee and the sector plan. Mere adoption of a sector plan does *not* change the zoning of any of the properties involved.

Elling Eide, the appellee, owns two parcels of land – one of approximately fourteen acres (the "14-acre parcel") and the other of approximately nineteen acres (the "19-acre parcel") – which are situated west of U.S. 41 about five miles south of the city limits of the City of Sarasota in Sarasota County. Eide also owns a parcel east of U.S. 41 which he leases to developers who have transformed it into a Kmart shopping center. Apoxsee designates this area as a village activity center around a regional center (the Sarasota Square Mall). Prior to the development of a sector plan for this area, the 19-acre parcel was zoned RSF-2 (residential, single family, 3.5 units/acre), and the 14-acre parcel was zoned RMF-2 (residential, multi-family, 9 units/acre).

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on the amount of commercial acreage permissible. R5-65. However, the possibility of a flexible amount of commercial acreage is not vital to our holding, and we assume that the 75 acres allotted for activity centers and the 125 acres allotted for community centers are caps.

In 1984 a property owner in the area requested permission from Sarasota County to prepare a proposed sector plan. Eide discovered that the sector plan included his 14-acre parcel but not his 19-acre parcel. After a County official informed Eide that inclusion in the sector plan was the only way that his properties would ever be considered for commercial zoning in the future, he asked that the sector plan boundary be amended to include his larger property as well. The County amended the sector plan as per his request.

In 1986, because Eide wanted to take advantage of the favorable capital gains tax law, he complained that the landowners who were preparing the sector plan were taking too long; at his request, the County's professional planning staff undertook the completion of the plan. The completed sector plan identified three possible alternatives for future zoning; two of these alternatives recommended some of Eide's property for commercial development, while the third recommended all of Eide's property remain residential (with the exception of the Kmart parcel). The sector plan's final recommendation adopted a hybrid of two of the alternatives; however, it recommended that Eide's parcels continue to be zoned residential. The sector plan also indicated that an amendment to Apoxsee designating the area as a community or town center would be appropriate in the future; however, the plan suggests that future commercial development should be located east of U.S. 41, and Eide's parcels are located to the west of 41. Sector Plan 84-2, pp. 47-48, 64, 93. On September 16, 1986, the County adopted the sector plan.

Before the completion of the sector plan, Eide filed a petition for the rezoning of his 14-acre parcel. However, a traffic study was required to accompany all rezoning petitions. After the County's planning staff returned the petition to Eide for a required traffic impact analysis, Eide voluntarily withdrew his petition. Eide never requested that his 19-acre parcel be considered for rezoning.

Challenging that the sector plan was unconstitutional as applied to his property,[3] Eide then filed a suit for declaratory and injunctive relief and compensatory damages under 42 U.S.C. § 1983[4] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[5] Sarasota County raised several defenses to Eide's claims,

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[3] In the district court, Eide abandoned any claim of facial unconstitutionality.

[4] 42 U.S.C. § 1983 (1981) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to the subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] The Fourteenth Amendment provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, § 1.

including a challenge to Eide's assertion that the County had made a final decision concerning his property. The district court rejected this ripeness defense. After a jury trial, Eide was awarded $850,000. In addition, the court enjoined the County from using any plan, ordinance, zoning code, or regulation to deny Eide commercial zoning.

We disagree with the district court's determination that this case was ripe for adjudication. Therefore, we reverse the district court's judgment and order that the Section 1983 claims be dismissed as not ripe.

II. ANALYSIS

Before we can analyze the district court's decision, we must first determine what type of claim Eide is making. Eide's reason for bringing suit is that the County did not grant him commercial zoning, and he requests that the County be required to rezone his property commercial. For grievances similar to Eide's, there are four types of challenges which a plaintiff may bring.[6] We refer to these claims as just compensation, due process takings, arbitrary and capricious due process, and equal protection claims.

First, a plaintiff can claim that the regulation at issue has taken his or her property without just compensation

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[6] In the following discussion, we consider only the standards that would be applied to a claim which involves a grievance similar to Eide's. We express no opinion as to what the standards would be for other types of claims such as physical taking and procedural due process claims.

in contravention of the Fifth Amendment.[7] *See Williamson County v. Hamilton Bank*, 473 U.S. 172, 186-97, 105 S.Ct. 3108, 3116-22, 87 L.Ed.2d 126 (1985) (Fifth Amendment claim not ripe for decision). In order to establish a violation of the just compensation clause, a landowner must demonstrate that his property was "taken," i.e., that the regulation "goes too far," and that there is no provision to award him just compensation. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 533-34, 106 S.Ct. 2561, 2565-66, 91 L.Ed.2d 285 (1986); *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F.Supp. 75, 77 (D.R.I.1989). The remedy for a violation of the Just Compensation Clause is money damages calculated by the value of the property rights taken and the duration of the taking. In order for such a claim to be ripe for adjudication, the landowner must overcome two hurdles, the final decision hurdle and the just compensation hurdle. The landowner must obtain a final decision regarding the application of the zoning ordinance or regulation to his or her property and utilize state procedures which provide for obtaining just compensation. *Williamson County*, 105 S.Ct. at 3116-20. The final decision requirement includes a requirement that the property owner seek variances from the applicable regulations. *Williamson County*, 105 S.Ct. at 3117. The reason for the final decision requirement is that

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[7] The Fifth Amendment of the United States Constitution provides in relevant part:

> [P]rivate property [shall not] be taken for public use, without just compensation.

U.S. Const. amend. V.

one of the factors significant to the adjudication of a just compensation claim is "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Williamson County,* 105 S.Ct. at 3119. This impact and interference cannot be determined until the local authority has determined the nature and extent of the development that will be permitted. *See MacDonald, Sommer & Frates,* 106 S.Ct. at 2567. In addition to the final decision requirement, a Fifth Amendment just compensation claim is not ripe until the landowner has pursued the available state procedures to obtain just compensation. *Williamson County,* 105 S.Ct. at 3120-22.

Second, a plaintiff can bring a claim that the application of the regulation goes so far and destroys the value of his or her property to such an extent that it has the same effect as a taking by eminent domain. Such an application would be an invalid exercise of the police power. We will call this type of claim a "due process takings" claim. The difference between a due process takings claim and a just compensation claim is that, for a due process takings claim, a successful suit would result in an invalidation of the local authority's application of the regulation and, perhaps, actual damages, whereas a just compensation claim is remedied by monetary compensation for the value taken.[8] *See First English*

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[8] This distinction may be academic if the Supreme Court decides that a non-physical "taking" claim is properly redressed by only the Just Compensation Clause or only the Due Process Clause. Much legal debate has been generated over this issue; *see, e.g.,* Note, *Testing the Constitutional Validity*

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Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (temporary takings may be remedied by compensation); *Williamson County*, 105 S.Ct. at 3116, 3122 (recognizing such a due process claim, but holding the claim to be premature). For a due process takings claim to be ripe, courts apply the same final decision requirement as in the just compensation claim context. *Williamson County*, 105 S.Ct. at 3123; *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F.Supp. 75, 81-82 (D.R.I. 1989). Like the reasoning in the just compensation claim area, the reason for this requirement in the due process takings claim context is that a court cannot determine whether a regulation has gone too far unless the court knows how far the regulation goes. *See Williamson County*, 105 S.Ct. at 3123. In *Williamson County*, the Supreme Court did not discuss the applicability of the just compensation hurdle in its analysis of the due process takings claim presented in that case. 105 S.Ct. at 3123.

Third, a plaintiff may argue that the regulation is arbitrary and capricious, does not bear a substantial

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of Land Use Regulations; Substantive Due Process as Superior Alternative to Takings Analysis, 57 Wash.L.Rev. 715 (1982); Note, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 Wash.L.Rev. 315 (1979); Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L.Rev. 711 (1982); however, neither the Supreme Court nor this Circuit has yet addressed this issue, and we need not decide it in this case.

relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power. *See Nectow v. City of Cambridge*, 277 U.S. 183, 236, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928); *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir.), *cert. denied*, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980); *but see Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (en banc) (zoning is quasi-legislative action, and, therefore, zoning decisions need only have conceivable rational basis), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566, 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). We will refer to such a claim as an "arbitrary and capricious due process" claim.[9] This claim is different from a due process takings claim. To prove the latter, a landowner must establish that the regulation goes "too far," destroying the value of the property to such an extent that it has the same effect as a taking by eminent domain. To prove an arbitrary and capricious due process claim, a plaintiff need only prove that the government has acted arbitrarily and capriciously.[10] Such a challenge may be either a facial

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[9] Most courts have referred to this type of claim as a substantive due process claim. *See, e.g., Williamson County*, 105 S.Ct. at 3114 n. 4; *Greenbriar*, 881 F.2d at 1571-81; *Weissman v. Fruchtman*, 700 F.Supp. 746, 753 (S.D.N.Y. 1988). However, this terminology has contributed to the confusion between an arbitrary and capricious due process claim and a due process takings claim.

[10] To illustrate, if a governmental entity has acted arbitrarily and capriciously (e.g. because of race) in the course of eminent domain proceedings, the fact that just compensation is paid would not undo the arbitrary act, nor cure the constitutional violation.

or an as applied challenge. *Pennell v. City of San Jose*, 485 U.S. 1, 10-12, 108 S.Ct, 849, 857, 99 L.Ed.2d 1 (1988); *Weissman v. Fruchtman*, 700 F.Supp. 746, 752-53 (S.D.N.Y. 1988). For a facial challenge, the remedy is the striking down of the regulation. *Weissman*, 700 F.Supp. at 753. In the case of an as applied challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application. The ripeness test used in *Williamson County* has often been applied to as applied arbitrary and capricious due process claims. *See, e.g., Greenbriar*, 881 F.2d at 1573-77; *Weissman*, 700 F.Supp. at 753-54. However, this application of *Williamson County* is questionable since *Williamson County* involved a due process takings claim. 105 S.Ct. at 3114 n. 4, 3116, 3122. The appropriate ripeness analysis for an arbitrary and capricious due process claim is discussed below.

The fourth type of claim is that the regulation denies equal protection. If the plaintiff claims that the regulation acts against him or her because of race or another suspect class or that the regulation involves a fundamental right, then the regulation is subject to strict scrutiny. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 1287-88, 36 L.Ed.2d 16 (1973) and cases cited therein. However, if the claim is simply that the regulation treats the plaintiff different from someone else and neither a suspect class nor a fundamental right is involved, the regulation (and its classification) must only be rationally related to a legitimate government purpose. *Fry v. City of Hayward*, 701 F.Supp. 179, 181 (N.D.Cal. 1988). An equal protection claim can attack the statute on its face or as applied to the property involved. *Fry*, 701

F.Supp. at 181. The remedy for a facial challenge is to enjoin the local authority from enforcing the regulation, *see Fry*, 701 F.Supp. at 183, while the remedy for an as applied challenge is an injunction against the unconstitutional application of the regulation to the plaintiff's property.

Courts have confused the standards for the first three claims (just compensation, due process takings, and arbitrary and capricious due process), and often one cannot tell which claim has been brought or which standard is being applied. *See Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F.Supp. 1369 (D.Md. 1975) ("a claim of *deprivation* of property without due process cannot be blended as one and the same with the claim that property has been *taken* for public use, without just compensation." (emphasis in original)); *Weissman v. Fruchtman*, 700 F.Supp. 746, 754-55 (S.D.N.Y. 1988) (assuming *Williamson County* applies to arbitrary and capricious due process claims). This court has itself confused due process takings and arbitrary and capricious due process claims. *Greenbriar v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989) (applying *Williamson County* to arbitrary and capricious due process claim).

This confusion may result in incorrect analyses of cases because different standards of ripeness are required for each of the three claims. A just compensation claim is ripe only when there has been a final decision and all state procedures for just compensation have been utilized. *Williamson County*, 105 S.Ct. at 3116. It is unclear whether, for a due process takings claim to be ripe, the landowner need only have received a final decision or

whether the landowner must also overcome the just compensation hurdle. In discussing the due process takings claim in *Williamson County*, 105 S.Ct. at 3122-23, the Supreme Court discussed only the final decision hurdle. Courts have entertained facial arbitrary and capricious due process claims on the merits while simultaneously finding that the same landowner's just compensation claim, due process takings claim, or as applied arbitrary and capricious due process claim was premature. *See Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 856-57, 99 L.Ed.2d 1 (1988) (facial arbitrary and capricious due process claims considered on merits while as applied equal protection and due process claims not ripe); *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F.Supp. 75, 77-83 (D.R.I. 1989)(facial arbitrary and capricious due process claim considered on merits while due process takings claim and just compensation claim premature); *but see Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir.) (ripeness analysis for just compensation and due process takings claims applies to equal protection claims and arbitrary and capricious due process claims), *cert. denied*, 488 U.S. 891, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir.) (same), *cert. denied*, 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 106 (1988). We discuss below the appropriate ripeness analysis for an as applied arbitrary and capricious due process claim.

We must first determine under which category or categories Eide's claim fits. At trial, Eide argued (1) that the County's denial of commercial zoning for his property was arbitrary and capricious and (2) that the distinction between his property and those properties which

were designated commercial was not rationally related to a legitimate government purpose. The relief he requested was an injunction barring the County from using any ordinance, regulation, or land use plan to deny him commercial zoning. He also sought and received damages for the temporary loss of the value of his property as commercial for the period he was denied commercial zoning.[11]

Eide made no claim in his complaint or at trial that he was due just compensation for the "taking" of his property. Therefore, he is not making a just compensation claim. Eide does not make a claim that the regulation has restricted his use of the property to such an extent that the result can only be accomplished by eminent domain. In his complaint and in the pretrial stipulation, the words, "taking" and "eminent domain," do not even appear. Thus, Eide is not making a due process takings claim. It is clear that Eide's claim amounts to an arbitrary and capricious due process claim. He claims that the County's denial of commercial zoning was arbitrary and capricious and unrelated to public health, safety, and welfare. Therefore, the only due process claim he advocates is an arbitrary and capricious due process claim.

An arbitrary and capricious due process claim can be either a facial challenge to the regulation or a challenge to the regulation as applied to the plaintiff's property. For a

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[11] The fact that Eide sought and received damages measured by the value of his land as commercial as well as an injunction barring the County from denying him commercial zoning reveals the nature of his claim – i.e., that the gravamen of his claim is that he was denied commercial zoning.

facial challenge, Eide's claim would be that the mere adoption of the sector plan was arbitrary and capricious. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). However, as we noted above, Eide abandoned any claim of facial unconstitutionality in the district court. Therefore, Eide's claim amounts to an arbitrary and capricious due process challenge to the sector plan as applied to his property – i.e. that he was arbitrarily and capriciously denied commercial zoning because of the application of the sector plan to his property.[12]

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[12] Eide claims that he was denied equal protection because the County treated his property different from other properties for no rational reason. In other words, Eide claims that the County's classifications of residential and commercial properties are irrational. Because his equal protection claim relies upon the same rationale as his as applied arbitrary and capricious due process claim, we apply the same ripeness standard to both claims. *See Anthony v. Franklin County*, 799 F.2d 681, 686 (11th Cir.1986); *St. Clair v. City of Chico*, 880 F.2d 199, 202 (9th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 541, 107 L.Ed.2d 539 (1989); *Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d 717, 722 (10th Cir.1989); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988), *amending* 834 F.2d 1488 (1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 134, 102 L.Ed.2d 106 (1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56, *as amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988); *Norco Construction v. King County*, 801 F.2d 1143, 1145 (9th Cir.1986); *but see Doe v. City of Butler*, 892 F.2d 315, 319 n. 2 (3d Cir.1989) (" '[u]nlike equal

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In *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1572 (11th Cir.1989), the plaintiff, like Eide, challenged a zoning decision by asserting an as applied arbitrary and capricious due process claim. In its ripeness analysis, this court in *Greenbriar* applied the finality prong of the *Williamson County* standard, held that the zoning decision was final, and thus held that it was ripe. We are bound to follow the holding in *Greenbriar* and require that the zoning decision under attack be finally made and applied to the property at issue. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc). Although *Greenbriar* placed improper reliance on *Williamson County*,[13] we

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protection . . . the focus of due process analysis is not whether the Township has irrationally distinguished between similarly situated classes, but whether it was irrational for the Township to have passed the law at all and to have applied it to [plaintiff].' *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir.1980)").

[13] In *Greenbriar*, this court assumed that *Williamson County* controlled and required that the as applied arbitrary and capricious due process claim at issue had to overcome the *Williamson County* finality hurdle in order to be ripe. However, a closer reading of *Williamson County* reveals that it did not involve what we refer to in this opinion as an arbitrary and capricious due process claim. In footnote 4, the Supreme Court clearly stated that it was not addressing a substantive due process claim (i.e., what we refer to in this opinion as an arbitrary and capricious due process claim). Rather, *Williamson County* involved the type of claim we have referred to in this opinion as a due process takings claim. 473 U.S. at 197-200, 105 S.Ct. at 3122-24. The rationale for requiring a final decision in the due process takings area is that the court cannot ascertain whether the regulation has gone "too far" until it can analyze

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conclude for the reasons discussed below that the holding in *Greenbriar* was correct.

It is important first to note that Eide's challenge is an as applied challenge, not a facial challenge. In order to challenge the County's *application* of the sector plan to his property, Eide must first demonstrate that the sector plan has been *applied* to his property.[14] *See Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 857 n. 5, 99 L.Ed.2d 1 (1988)

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the effect that the zoning decision has had on the value of the property. Thus, in *Williamson County*, the Supreme Court applied the finality prong of the ripeness analysis, just as it had for the just compensation claim. This rationale is not applicable to an as applied arbitrary and capricious due process claim. Such a claim does not have to establish that the regulation has gone "too far"; rather, a property owner's rights have been violated the moment the government acts in an arbitrary manner and (in an as applied challenge) that arbitrary action is applied to the owner's property. *See infra* n. 16. This court in *Greenbriar* erroneously assumed it was controlled by *Williamson County*, and thus erroneously used the *Williamson County* analysis. However, for the reasons explained in the text, our result in *Greenbriar* was correct in that a zoning decision cannot be the subject of an as applied challenge until the decision to apply the regulation to the plaintiff's property has been made.

[14] This requirement does not apply to a facial challenge. *Fry v. City of Hayward*, 701 F.Supp. 179, 181 (N.D.Cal.1988). There is an important reason for this distinction: when a landowner makes a facial challenge, he or she argues that *any* application of the regulation is unconstitutional; for an as applied challenge, the landowner is only attacking the decision that applied the regulation to his or her property, not the regulation in general.

(dismissing as premature as applied arbitrary and capricious due process claim and as applied equal protection claim because plaintiffs did not identify any property taken by application of act); *Agins v. Tiburon*, 447 U.S. 255, 260-61, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (discussing ripeness of "as applied" challenge in due process takings and just compensation areas); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 2370-71, 69 L.Ed.2d 1 (1981) (absent allegation that property has been taken by act, as applied just compensation claim is premature; but facial challenge can be considered); *Fry v. City of Hayward*, 701 F.Supp. 179, 181 (N.D.Cal.1988) (for as applied equal protection challenge, landowner must receive final decision on application of statute to property prior to bringing suit in federal court); *see also Hodel*, 101 S.Ct. at 2352-53 (Powell, J., concurring) (stressing that plaintiffs identified no specific property which was taken, and, therefore, majority's holding restricted to decision on facial constitutionality). If the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made. For example, in *Pennell*, the appellants challenged an ordinance that allowed the local authority to take a tenant's hardship into account in determining what size of rent increase to allow. The Court held that the appellants' just compensation claim was premature because there was no evidence that the "tenant hardship clause" had ever been relied on in making a decision. 108 S.Ct. at 856. In addition, for the same reasons, the Court dismissed the appellants' claim that the application of the

provision to their property violated the due process and equal protection clauses.[15] 108 S.Ct. at 857 n. 5. However, the Court considered the merits of a facial challenge to the statute under the Equal Protection and Due Process Clauses. *Id.* Therefore, the Supreme Court's decision in *Pennell* supports our determination that, for as applied arbitrary and capricious due process claims to be ripe, the particular zoning decision being challenged must be finally applied to the property at issue.[16]

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[15] The Court did not make absolutely clear whether the due process claim was an arbitrary and capricious due process claim or a due process takings claim. However, since 1) the Court treated the equal protection claim in the same manner as the due process claim, 2) the appellants attacked the ordinance with a facial arbitrary and capricious due process claim, and 3) the Court's discussion does not indicate that appellants claimed the ordinance destroyed the value of their property to such an extent that it had the same effect as a taking by eminent domain, we find that the due process claim involved was an arbitrary and capricious due process claim.

[16] As *Greenbriar* recognizes, the standard for a final decision in the as applied arbitrary and capricious due process area is not the same as that of the due process takings and just compensation areas. 881 F.2d at 1576 n. 11. In the areas of due process takings and just compensation, there are two parts to the final decision hurdle. First, the zoning decision must be finally made and applied to the property. Second, the local authority must have made all other decisions necessary for the court to determine whether the landowner has been deprived of substantially all economically beneficial value of the property. Therefore, for these claims to be ripe, the plaintiff is required to reapply for zoning in order to establish what extent of development will be permitted and for a court to determine whether the regulation has gone "too far". *See MacDonald,*

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The ripeness of an as applied arbitrary and capricious due process claim depends upon the nature of the claim, which is often revealed by the remedy sought. We can conceive of an arbitrary and capricious due process claim in which the final decision requirement would be satisfied with a single arbitrary act. For example, if a landowner's initial application for commercial zoning had been rejected at a preliminary stage simply because

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Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 2566-68, 91 L.Ed.2d 285 (1986). On the other hand, with respect to an as applied arbitrary and capricious due process claim, the final decision hurdle is satisfied when the first prong is met – i.e., when the zoning decision being challenged is finally applied to the property. Thus, in an as applied arbitrary and capricious due process claim challenging a zoning decision denying commercial zoning, the landowner need only obtain a final decision denying commercial zoning. The *MacDonald* requirement does not apply to Eide's as applied arbitrary and capricious due process claim because Eide does not allege the deprivation of all beneficial use of his land, and, therefore, a court does not need the additional determination in order to adjudicate his claim. once the local authority has made a final decision denying commercial zoning to Eide, Eide's as applied arbitrary and capricious due process claim will be ripe.

In addition, the just compensation hurdle applied in the just compensation claim context does not apply to arbitrary and capricious due process claims. *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1574 n. 8 (11th Cir.1989). The reason for this is that an arbitrary and capricious act by a government is unconstitutional even if the government pays just compensation. A property owner's rights are violated "the moment a governmental decision affecting his [or her] property has been made in an arbitrary and capricious manner, regardless of whether he [or she] is later compensated for that violation." 881 F.2d at 1574 n. 8.

the landowner was a redhead, the landowner's arbitrary and capricious due process claim challenging that action would be ripe. That decision can be immediately challenged because the arbitrary and capricious act has been applied to him. However, the remedy for the mere rejection of the redheaded landowner's application would not be an injunction requiring a grant of commercial zoning, but rather would be the overturning of the arbitrary decision, possibly an injunction against similar irrational decisions, and other remedies depending on the situation. The landowner could not prove the damages that Eide seeks – i.e. commercial zoning – without first claiming and proving a final decision by the local authority denying commercial zoning.

In this case, Eide does not merely challenge the rationality of the sector plan. Rather, he asserts that he was arbitrarily denied commercial zoning, and he proved and received damages for the temporary loss of the value of his property as commercial property. As demonstrated above, such an as applied arbitrary and capricious due process claim is not ripe until the decision denying commercial zoning has been finally made and applied to the property.

Eide has not met this burden. He has not submitted even a single plan for the commercial development of his properties. He has not submitted a petition to rezone his properties from their present residential zoning to commercial zoning. Therefore, the County has not been given an opportunity to apply the sector plan to his property.

Eide argues that his reasons for wanting his land rezoned commercial were presented to the Planning

Commission and to the County during the proceedings which culminated in the adoption of the sector plan. He argues that his reasons were fully considered and rejected by the appropriate decision-making bodies, and thus it would be futile for him to pursue further action before the County. In addition, Eide argues that, because Florida law requires that all future zoning be consistent with the sector plan and because the sector plan designates his property residential, commercial development of his property would obviously be inconsistent with the sector plan and, therefore, contrary to Florida law.

The so-called "futility exception" to the final decision requirement for due process takings and just compensation claims does excuse the repeated submission of development plans where the submission would be futile.[17] *See*

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[17] In as applied arbitrary and capricious due process challenges to ordinances and land use plans, the Seventh and Ninth Circuits have held that, until "at least one 'meaningful application' " has been submitted for the local authority's review and application of the zoning regulations, futility is not established and a constitutional challenge to local zoning may not be entertained. *Shelter Creek*, 838 F.2d at 379; *see Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *Herrington v. Sonoma County*, 834 F.2d 1488, 1494-95 (9th Cir. 1987), *as amended*, 857 F.2d 567, 569 (9th Cir. 1988) (stating: "a property owner cannot rely on the futility exception until he or she makes at least one meaningful application" but holding that the claim was ripe for adjudication), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

The Seventh and Ninth Circuits' requirement of a final decision involving a specific development plan before suit may be filed is supported by an important reason: zoning is a

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Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 106 (1988). However, we are not satisfied that the consideration of Eide's arguments, as merely a few of the many matters considered as part of the overall plan, establishes that the County would not grant him commercial zoning if he applied for rezoning.

We therefore turn to Eide's argument that further proceedings before the County would be futile because the County is constrained by Florida law requiring that all future zoning be consistent with the sector plan and that commercial zoning of his property would be inconsistent with that plan. The major flaw in this argument is that Eide's determination of what is inconsistent with the sector plan is not controlling here; the County and the Florida courts are arbiters of what is consistent. As stated above, the sector plan does not rezone any land commercial or noncommercial; it merely dictates that all future development be consistent with it.

In this regard, there is a split in the Florida state courts over what is meant by the requirement of consistency. In *Southwest Ranches Homeowners Ass'n v. Broward*

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delicate area where a county's power should not be usurped without giving the county an opportunity to consider concrete facts on the merits prior to a court suit. For the reasons stated in the text, we are not convinced that the facts of this case demonstrate that it would be futile for Eide to pursue commercial zoning. Therefore, we need not decide in this case whether to adopt the per se requirement in the Seventh and Ninth Circuits that at least one meaningful application be submitted to the local zoning authority before an as applied claim is ripe for adjudication.

County, 502 So.2d 931, 935 (Fla. 4th DCA 1987), Florida's Fourth District held that the land use element of a comprehensive plan is not the "sole, controlling document with which subsequent plan elements ha[ve] to comply." Instead, the court required that a county's approval of a zoning more intensive than that envisioned by the comprehensive plan be considered in light of all of the elements of the comprehensive plan, and not simply rejected on the basis of a single element. On the other hand, in *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *adopted en banc*, 519 So.2d 629 (Fla. 3d DCA), *review denied*, 529 So.2d 693, 694 (Fla.1988), the Third District required strict adherence to all elements of the comprehensive plan including the land use element. Neither of these Florida court decisions are binding in Sarasota County. In addition, during a County Commission hearing introduced at trial, the Commission Chairman stated: "Commercial in that area is not part of the Sector Plan, but that doesn't stop the Board from reversing the staff recommendation." Therefore, since the sector plan did not rezone any land, but rather, it only adopted plans for future rezoning, the County could determine that commercial development of Eide's parcels is consistent with the sector plan and would not violate the 75 acre "cap"; thus, it is premature to determine that such a rezoning would be inconsistent with the plan.

Decisions on ripeness issues are fact-sensitive. On the particular circumstances of this case and for the foregoing reasons, we conclude that the instant Section 1983 claims are not ripe. Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

SHOOB, District Judge, concurring:

I concur with the majority opinion insofar as it provides an appropriate, though unwieldly, framework for analysis of ripeness issues. The majority probably reaches the correct conclusion in light of this Court's decision in *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir.1989). I write separately because, while the majority concedes that "[d]ecisions on ripeness issues are fact-sensitive," I do not believe the applicable law reflects or incorporates sufficient deference to the trial court's factual determinations.

The deficiencies of the ripeness standard in zoning cases are most apparent with regard to the "futility exception." To qualify for this exception to the final decision requirement, at least two circuits demand submission of one meaningful zoning application. *See Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.), *cert. denied*, 488 U.S. 891, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *as amended*, 830 F.2d 968 (9th Cir.1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988). That often logical approach, however, fails to account for specific facts, which, in individual cases, might render even a single application a waste of time.[1]

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[1] Although it does not reach a decision on this issue, the majority cites with approval the position of the Seventh and Ninth Circuits. In addition, by stating that "we are not convinced that the facts of this case demonstrate that it would be futile for Eide to pursue commercial zoning" the majority demonstrates a similar lack of deference to the district court's factual findings.

The district court concluded that the adoption of a sector plan by appellants was tantamount to an adverse zoning decision. The district court further found, in view of the circumstances surrounding adoption of that sector plan, that any attempt to obtain a more favorable zoning decision would be futile. I would not disturb lightly the conclusions of the district court, which is infinitely more knowledgeable about the practical realities in this case. Moreover, where such factual considerations are involved, I do not believe the appellate court should substitute its detached view of whether further participation in the zoning process would be futile for the informed findings of the trial court.

For the foregoing reasons, I concur in the result only.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3700

ELLING O. EIDE,

Plaintiff-Apppellee,

versus

SARASOTA COUNTY, a political subdivision of the State of Florida,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING
(SEP 13 1990)

BEFORE: ANDERSON and COX, Circuit Judges, and SHOOB*, District Judge

PER CURIAM:

The petition for rehearing filed by appellee, is Denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

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*Hon. Marvin H. Shoob, U. S. District Judge for the Northern District of Georgia, sitting by designation.

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

ELLING O. EIDE	JUDGMENT IN A CIVIL CASE
V.	
SARASOTA COUNTY	CASE NUMBER: 86-1368-CIV-T-15A

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of Plaintiff, Elling O. Eide, in the amount of $850,000.00 and against Defendant, Sarasota County.

May 23, 1988
Date

DONALD M. CINNAMOND
Clerk

/s/ Pamela B. Foster
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELLING O. EIDE,

Plaintiff,

v.

SARASOTA COUNTY, a political subdivision of the State of Florida,

Defendant.

Case No. 86-1368-Civ-T-15A

ORDER

(Filed May 23, 1988)

This cause is before the Court on plaintiff's request for an injunction enjoining defendant Sarasota County from enforcing its sector plan and zoning code as it applies to plaintiff's property. This matter was tried to a jury, which found that the defendant violated plaintiff's federal constitutional rights to due process and equal protection by zoning plaintiff's property residential. The jury also found, in an advisory verdict, the Sarasota County's action toward plaintiff amounted to unreasonable regulation under Florida state law. Based on the jury's verdict, which the Court expressly approves and adopts, it is

ORDERED:

That the defendant, Sarasota County, is hereby enjoined from enforcing the defendant's comprehensive plan, sector plan, zoning code, or any other ordinances or

regulations to the extent that such plans, codes or other ordinances or regulations prohibit the commercial use of plaintiff's 14 and 19 acre parcels which were the subject of this case.

DONE AND ORDERED at Tampa, Florida this 23rd day of May, 1988.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
UNITED STATES
DISTRICT JUDGE

Copies to
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELLING O. EIDE,

Plaintiff,

v.

SARASOTA COUNTY,

Defendant.

Case No.
86-1368-Civ-T-15A

ORDER

The Court has considered the defendant Sarasota County's motion for judgment notwithstanding the verdict, or in the alternative, for new trial (D-56) and plaintiff's response (D-60). The Court has also considered the defendant's motion for a stay (D-57), which is moot by virtue of this order. The principal matter raised by defendant – ripeness – was explicitly raised, considered, and ruled upon at trial; the Court has nothing to add to its previous ruling. Accordingly, it is

ORDERED:

1. That the defendant Sarasota County's motion for judgment notwithstanding the verdict, or in the alternative, for new trial (D-56) is denied.

2. That the plaintiff is directed to submit proposed findings of fact and conclusions of law on the state law unreasonable regulation claim within 20 days from the date of this order.

3. That the defendant Sarasota County's motion for a stay (D-57) is denied as moot.

DONE AND ORDERED at Tampa, Florida this 2nd day of July, 1988.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
UNITED STATES
DISTRICT JUDGE

Copies to
Counsel of Record

April 20, 1988

[R. 8, p. 97] MR. NELSON [County Attorney on Motion for Directed Verdict]: And the second point is that under the most recent case, this Illinois case that we cited on exhaustion of remedies, the evidence seems to be clear so far as our interpretation is concerned insofar as Mr. Eide is concerned that there never was prepared a final development plan for either parcel; and, therefore, none was ever submitted and ever rejected by local government.

And the argument that there was no purpose or that it would have been futile, failed, because Mr. Eide indicated that he knew that the staff - his argument is really with [p. 98] the staff. The staff, I think did indicate that they would recommend against it, but I think he further without any question admitted that he knew that the staff didn't have the responsibility for making the decision, and -

THE COURT: *Well, how could the country permit commercial development of his property in view of the zoning plan, the comprehensive zoning plan, and the sector plan?*

MR. NELSON: Two ways. Or rather, three ways. Number one, in the sector plan itself - let me get a copy of the summary -

THE COURT: *There was testimony that the sector plan would have to be amended.*

MR. NELSON: *Yes. Or the Comprehensive Plan amended.*

THE COURT: *Both of them would have to be amended.*

MR. NELSON: Well, the amended Comprehensive Plan automatically would carry with it an amendment of the sector plan, because the sector plan really becomes part of the Comprehensive Plan.

THE COURT: What obligation is there by law to impose upon a citizen to seek legislative change in the comprehensive zoning plan before bringing action? How is that required by the exhaustive remedy?

MR. NELSON: Well, as I understand the concept and the most recent case law, what – if the owner's obligation [p. 99] is to do – is to seek and be turned down at least one time before he's entitled to go to Court. And, as I read that recent case – what's the style of it – Unity Ventures case which we cited in our trial brief – and I'm sure the Court has read it.

THE COURT: Yes, I have.

MR. NELSON: The owner is obligated to submit a final –

THE COURT: *Unless it would be futile.*

MR. NELSON: – *unless he could show that it would be futile.*

THE COURT: *Why would it not be futile for the plaintiff to do anything further on this in view of the comprehensive zoning plan and in view of the sector plan? What is it that the owner could do?*

MR. NELSON: If I may say, the owner, when he ascertains what he has known all along, that the planning staff were going to recommend denial, he says, well, it's futile to go ahead.

The fact of the matter is that he knew and I think everybody else knew that the planning staff is only an advisory body and they don't have the –

THE COURT: *But the sector plan was actually adopted. The comprehensive zoning plan was actually adopted. We're not going on just a recommendation.*

[p. 100] MR. NELSON: But what I'm saying is, in answer to your question is, we feel that the other had an obligation to come up with a final development plan and asked to have that plan approved and have it be turned down before he was entitled to institute litigation.

THE COURT: *Well, he didn't institute litigation until after the sector plan had been adopted.*

MR. NELSON: *Yes. I see what you mean.*

THE COURT: *What was he supposed to do after the sector plan had been adopted?*

MR. NELSON: The mere fact that the sector plan – Your Honor, the mere fact that the sector plan recommends residential zoning, that doesn't mean that the Board of County Commissioners could not grant him zoning on an infill theory. Infill theory –

THE COURT: They would have to amend –

MR. NELSON: No, sir.

THE COURT: – the zoning plan.

MR. NELSON: No, sir. On an infill theory, they have the responsibility and authority to determine that on the infill theory if they found it applicable – and I'm not going to say to you that it is, because I don't think infill

would apply because of the surrounding property – but the owner contended that it was infill, and he has argued that it was infill.

[p. 101] And if it were infill and he could convince the Board of County Commissioners that it was infill, he wouldn't have to amend the sector plan or the Comprehensive Plan or anything else. They would have the authority and responsibility if convinced that it was infill to give him the zoning that he requested.

THE COURT: *That's Mr. Nelson's testimony. We don't have that elsewhere at the moment, do we?*

MR. NELSON: *Your Honor, I hate to say no because I'm not really sure.*

THE COURT: *I don't recall any of that testimony being produced. . . .*

[p. 102] THE COURT: Mr. Hemke?

MR. HEMKE: May it please the Court, let me take up Mr Nelson's two major points first, Your Honor.

The first major point is the futility argument. There has been testimony by Mr. Eide that he was told by the county people that if he were not included within the sector plan area that he could never get commercial zoning in that area. Mr. Eide talked about that the very first day of trial, that is unrebutted.

Apart from that, Florida Statute 163, which is the Comprehensive Land Use Planning Act, et cetera, says that any development order – and development orders include such things as rezonings – that they must be consistent with the comprehensive land use plan. And as

its been implemented by Sarasota County here, the comprehensive land use plan includes the sector plan.

So that the county board could not grant Mr. Eide commercial development on the highway without violating [p. 103] Florida Statutes Chapter 163.

THE COURT: Mr. Nelson says they could on an infill basis.

MR. HEMKE: They have – first of all, there's no evidence to that. And second of all, that contradicts what Mr. Eide testified to that he was told. That also contradicts the testimony of Mr. Bass, who testified that it would have to be included within the designated commercial.

THE COURT: For purposes of this motion, the issue is in controversy.

MR. HEMKE: We think it's unrebutted, but at least in controversy.

THE COURT: Yes. . . . (Emphasis added).

April 26, 1988

[R. 11, p. 170] THE COURT [prior to jury charge conference]: It occurs to me, Mr. Nelson, that on your earlier motion for directed verdict based on the ripeness [p. 171] issue, I might make a comment which will be helpful to the record. *The Court finds that although the plaintiff presented no specific plan to the County for development, it is clear that it would have been futile to have done so. Neither a variance nor special exception could have been of any assistance to the plaintiff in obtaining commercial use of the property because that could not be obtained by way of variance*

or special exception. The Court finds that the only way that the plaintiff could have obtained commercial use of the property was to proceed by way of request for rezoning or request for an amendment to the Sector Plan, both of which are legislative remedies which the plaintiff was not obliged to pursue prior to seeking judicial intervention. All right.

We will at this point, Counsel, review the proposed instructions. I'll ask that you refer to those which have been provided to you, the Court's proposed instructions. I am referring to them by the number and letter designation in the upper right-hand corner. If you have any comments or objections interrupt me and we will discuss it. If not, I'll simply go on to the next one. . . .

[p. 190] THE COURT: *The decision has been made that his property will not be zoned commercial. . . .*

[p. 191] [MR. NELSON:] It's not applicable to Mr. Eide until such time as he either asks for rezoning or takes some other action.

THE COURT: *Well, it's applicable to Mr. Eide in that it is a determination by the legislative body that he may not use his property for commerical purposes.* If it says that, his property is excluded from commercial use. . . . (Emphasis added).

* * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SARASOTA COUNTY, Appellant,	:	
vs.	:	Case No. 88-3700
ELLING O. EIDE, Appellee.	:	

On appeal from the United States District Court Middle District of Florida

PETITION FOR REHEARING

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Introduction. The subject case not only is important to Eide, who wants to develop his 33-acre highway properties in order to preserve his 63-acre homesite, but is important to property owners and to growth management in Florida. If this case is not ripe, no case is ripe. Eide made his case for commercial at more than 10 hearings over two years in the sector plan process specifically designed to determine whether Eide's properties should be designated commercial.

The opinion overlooks that *the sector plan had one purpose – to decide which properties should be designated commercial.* The opinion contains two fundamental errors – (1) that Eide could have obtained rezoning to commercial consistent with the sector plan, and (2) that Eide had to pursue legislative remedies.[1]

The errors in the opinion may stem from the word "plan" itself. "Plan" may mean precatory guidelines, as apparently it does in Alabama where Judge Cox suggested that plans are never followed. "Plan" also may imply broad-brushed, generalized documents. *But the sector plan involved here is neither precatory nor broad-brushed. Rather, it is mandatory, site specific, and the equivalent of site-specific zoning decisions.* It is in the sector planning process, not in the subsequent rezoning process, that the landowner presents his arguments and evidence for commercial designation, as Eide did here. The landowner does so because the sector plan is where the decision concerning commercial designation will be made. As Apoxsee indicates, subsequent rezoning can be handled administratively. No one, except the County attorney in his determination to be rid of the Eide lawsuit, has ever suggested that sector plans are not final and enforceable. To hold otherwise is to rewrite State and local law.

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[1] The opinion contains other errors, but those errors need not be considered where, as here, Eide could not obtain commercial zoning consistent with the sector plan and where a property owner has no duty to pursue legislative remedies. So that the record is clear, those errors are included as Appendix A to this petition.

As for being mandatory, Florida is at the forefront at putting teeth into growth plans to prevent local governments from making individual zoning decisions based on politics. Once adopted, a "plan" has the force of law. The County admitted at trial that "once a Sector Plan [is] adopted. . . . it become[s] a part of the Comprehensive Plan" (R. 6-82). The County also admitted at trial that the sector plan resulted in certain "parcels that were asking for designation as commercial through the sector planning process [being] *turned down* just as Eide was" and that Eide *"was turned down"* (R. 6-112).

As for being site-specific, Apoxsee defines "sector planning" as "site or parcel-specific" (Px 3, p. 361). The sector plan here was designed to control development on specific parcels for 15-20 years (Px 8A, p. 68, R. 6-103, 104, 126). The County's primary expert testified that sector planning involves "a site specific area. We're able to go into depth, if you will, on such things as traffic, *where the future development is to take place in a specific manner"* (R. 9-23). Site-specific analysis was assured here because the sector plan involved basically three landowners (Px 8A, p. 8).[2] As the County planner testified, those three landowners "were looking for commercial development in the Sector Plan" (R. 10-16), and some of those owners' "requests" were *"denied"* (R. 10-17, 18). Again, the County admitted at trial that Eide "was turned down" (R. 6-112).

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[2] Three landowners – Eide, Wilbanks, and Culverhouse – owned almost 85% of the lands considered for commercial designation in the sector plan (Px 8A, pp. 8, 10). Only four landowners made presentations for commercial in the sector plan process.

Because the sector plan was so site specific, the County planning staff, planning commission, and County commission considered in depth whether the Culverhouse, Wilbanks, or Eide properties should be commercial. Eide made presentations at at least ten County hearings (Eide affidavit of 1/21/88, ¶11). Whether the Eide properties should be commercial or residential was discussed in great depth prior to the County *deciding* residential (for example, in the sector plan itself, Px 3A, pp. 15, 21, 29, 30, 40, 65; at the hearing of 8/28/86, Px 124, pp. 20-34, 46-76, 92-94; at the hearing of 9/4/86, Px 125, pp. 9-16; and at the hearing of 9/16/86, Px 126, pp. 35-56, 76-105).

Commissioners Anderson and Greenwald indicated at the hearing of September 16, 1986, that the issue in the sector plan was whether Eide's properties "should be commercial or residential. *Period*" (Px 126, p. 51). Certainly, any "application" requirement was satisfied, and *the County not only had "the opportunity to consider the arguments for commercial zoning of Eide's land," but considered those arguments in much greater detail than in any rezoning.*

As for the sector plan having the finality of rezoning, Apoxsee indicates that "proposals that are inconsistent with the sector [plan] would require the approval of an amendment to that plan before the proposal could, in turn, be approved by the Board of County Commissioners. However, *future development requests that are consistent with the [sector plan] could theoretically be processed administratively*" (Px 3, pp. 361-362). They can be processed administratively because *all* of the issues which the County otherwise would consider in connection with

rezoning where there is no sector plan (land use patterns, land use compatibility, traffic, drainage, environmental, archaeological, and utility issues) were considered in connection with the site-specific sector plan which designated the Eide properties as residential (Px 8A).

The evidence at trial was that the decision concerning commercial would be made in the sector planning process, rather than in the rezoning process. The County's planning director testified that "[t]he purpose and objective of this sector plan was *to determine future commercial land-use allocations. . . .* " (R. 9-110). The County's planner indicated that *the sector plan was to determine "where the . . . commercial land should go," rather than "handling rezoning under a first come, first serve basis"* (Px 117, p. 9). There have been 29 rezoning petitions for properties within sector plans in Sarasota County, and *each time the property has been rezoned to the land use designated in the sector plan* (R. 6-15, 16). The County commissioners noted that the issue in the sector plan was whether Eide's property "should be commercial or residential. Period" (Px 126-51).

Thus, *it is the sector plan itself, not the subsequent formality of rezoning, that decides what is consistent with Apoxsee and the sector plan.* Conformity with the comprehensive plan (Apoxsee) and all variables that might go into a decision about "consistency" are decided in the sector planning process, not at the subsequent rezoning, which is only concerned with housekeeping details such as traffic lights, acceleration and deceleration lanes, and buffers. *In a post-sector plan rezoning process, the County has never denied rezoning to the land use designated in the sector*

plan, and it has never granted rezoning to a land use more intensive than the land use designated in the sector plan.

In summary, because the sector plan was mandatory, was site specific, and was the equivalent of a zoning denial, the case is ripe. As this Court held in *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483, 1487 (11th Cir. 1988), a rezoning "undeniably constituted a final, definitive position." Certainly, the sector plan decision here was more "final" and "definitive" than any rezone decision.

(1) *The County made a "final decision" concerning the commercial use of Eide's highway properties.* The opinion incorrectly finds that the case was not ripe because the County did not have the opportunity "to consider the arguments for commercial zoning of Eide's land concretely and independently" and because Eide's arguments were "merely a few of the many matters considered as part of the overall plan" (opinion at 1913).

As noted above, the sector plan was site specific and the appropriate land use, commercial or residential, of the Eide highway properties was considered in far more depth in the sector planning process than in any rezoning. Moreover, Eide submitted studies and plans for his properties to the County Commissioners (R. 4-105, Px 54, Px 126, p. 40), and attended at least 10 hearings in conjunction with the sector plan where he and his experts made the case for commercial (R. 4-120).

Perhaps the problem here is the relative newness of the sector plan and the Florida laws on growth control. In the past it was the zoning process that determined whether or not a landowner could have the zoning he

desired. Thus, some cases may have equated "meaningful application" with the submission of a development plan in connection with a rezoning application. *Now*, in Sarasota County, however, when a sector plan is required, it is the sector planning process that determines whether the landowner may obtain his zoning. It is in the sector planning process that the landowner submits his facts, documents, and arguments "for the local authority's review" because that sector plan, when adopted, is going to become, in effect, the zoning regulation. *The "one meaningful application" (the all important, win-or-lose application) is the one that the landowner makes in the course of the sector planning process.*

Except for the fact that rezonings were not formally conferred at the end, the hearings were, for all practical purposes, an extended rezoning hearing at which the County staff, the landowners, their experts, and their attorneys presented all possible evidence and arguments why this or that piece of property should have commercial zoning. The "many matters considered" all had to do with deciding which properties should have commercial zoning, and they were considered with far more detail, concreteness, and finality than in a normal rezoning. Clearly, the County had "arrived at a definitive position. . . . " *Williamson County*, 473 U.S. at 103.

The opinion says "Eide has neither submitted a development plan to the County nor presented the County with a petition for rezoning" (opinion 1912a, see also the middle of page 1912b). Surely, the opinion must be saying this partly because it overlooks the importance and finality of the sector plan decision. As previously noted, when a sector plan is required, the landowner

presents all of his evidence and arguments in the sector planning process, if he wants to have any hope of getting the zoning he desires. But perhaps the court is also misled by deficiencies of the record. Judge Castagna, *understanding sector plans under Florida law,* at pre-trial and at trial, rejected the County's claims that the case was not ripe. Thus, it was not necessary to present a fuller record of Eide's efforts to regain his commercial zoning through the sector plan process. Suffice it to say, Eide did submit a commercial development proposal, including detailed architectural drawings and photographs of a model for phase one of his two-phase development proposal. *He offered expert testimony as to the importance to the County of preserving his 63-acre waterfront homesite (with wilderness areas and plant collections) instead of developing it along with his highway frontage in a residential complex as the County has advocated since 1965.* In every forum available, he pleaded with the County for *restoration* of his commercial zoning, offering all possible argument and evidence.

(2) *Pursuing rezoning to commercial would have been futile.* The opinion notes that "we are not satisfied that there has been a final decision denying commercial use of [Eide's] property" because "we are not satisfied that further efforts to obtain commercial zoning would be *futile*" (opinion at 1914). In so holding, the opinion overlooks the trial court's findings, evidence at trial, the County's trial position, Apoxsee, County ordinances, Resolution No. 86-461 (Px 74), State law, and common sense.

Trial court findings. Judge Castagna oversaw the case for two years and heard the evidence at the 10-day jury trial; Judge Castagna specifically found that "it would have been futile" for Eide to proceed (R. 11-171). Judge

Castagna specifically found that the sector plan "was actually adopted. We're not going on just a recommendation" (R. 8-99). Moreover, *Judge Castagna found no evidence that Eide could obtain commercial zoning consistent with the sector plan* (R. 8-101). Judge Castagna reaffirmed his ripeness rulings in denying the County's post-trial motions.[3]

Trial evidence. There was substantial evidence that the Eide properties could not be rezoned to commercial consistent with the sector plan. County staff told Eide that "if one was not [designated commercial] in the Sector Plan one could never be considered for commercial zoning" (R. 4-56, 57, 63, 64, 69, Px61). *A fortiori,* Eide had no chance once the sector plan designated his property residential and once Resolution No. 86-461 was passed. Mr. Bass specifically testified that Eide's properties could not be rezoned to commercial once they were designated residential in the sector plan (R. 6-16,81). Dr. Starnes, *the County's expert,* testified that Eide's properties should remain residential (rather than commercial) "because of consistency with the County Comprehensive Plan and with the County Sector Plan. . . . " (R. 10-177). Prior to the withdrawal of Eide's rezoning petition, the Planning Commission told Mr. Eide that he "would be wasting

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[3] Whether pursuing rezoning to commercial would be futile involves, in part, Florida law. Thus, this Court should defer to Judge Castagna's findings. *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543 (11th Cir. 1985); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1490-1491 n.6 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984); *Alabama Electric Cooperative, Inc. v. First National Bank*, 684 F.2d 789, 792 (11th Cir. 1982); *Kaufman & Broad Home Systems, Inc. v. International Brotherhood of Firemen & Oilers*, 607 F.2d 1104, 1108 (5th Cir. 1979).

[his] time" in pursuing rezoning because commercial would not be "consistent with the County requirement that it be residential" (R. 4-115).

The opinion quotes the Commission chairman at the Commission hearing of March 11, 1986, *two months prior to the County staff beginning work on the sector plan and six months prior to the sector plan being adopted*, that the Commission could "revers[e] the staff recommendation" (opinion at 1914 quoting Px 118, p. 116). The Commission did not reverse the staff recommendation, but adopted Resolution No. 86-471 requiring Eide's properties to be residential. What the chairman was saying, in effect, was that, "if we want to allow commercial zoning on Eide's property, we can reverse the staff recommendation when we review and adopt the sector plan." He was not saying, "we can reverse the staff recommendations after we have adopted them and they have become law."

County trial position. The County admitted that commercial development of Eide's properties "would be inconsistent with the County Comprehensive Plan" (Pretrial Stipulation at 16). The County admitted that state law requires the comprehensive plan, that the sector plan is part of the comprehensive plan, and that after the plans are adopted the County is "required" to apply the plans "to all the property" (R. 4-17). As the County pointed out, the adopted sector plan "designat[ed]" the Eide properties "for residential purposes" (R. 4-23). *The County never seriously suggested at trial that rezoning alone would be sufficient – it was always rezoning preceded by amendments to the comprehensive and sector plans* (R. 4-19).

State law. Florida Statutes 163.3215 provides that any "aggrieved or adversely affected party," including the State Department of Community Affairs (DCA), may sue to enforce the "consistency" requirement (see Florida Statutes 163.3164 (16), 163.3194). If a local government can determine that rezoning to commercial is "consistent" with a site-specific plan that designates a particular property as residential, then the DCA can *never* challenge a rezoning as inconsistent with the plan. The Florida Legislature's mandate of making plans enforceable will be nothing more than a pipe dream.

County ordinances. Sarasota County Ordinance 25-5(f) also requires that development orders, such as rezonings, be "consistent" with adopted sector plans. Moreover, Resolution No. 86-461 adopting the sector plan here specifically provided that *"[f]uture development approvals (i.e., rezonings,* special exceptions, site and development plans, preliminary subdivision plans, and final subdivision plans) *shall be consistent with the land use plan (see Figure 1 attached). . . . "* (Px. 74). Figure 1, attached as Exhibit B to this petition, shows the Eide properties as multi-family residential.

This Court has specifically recognized that a landowner need not pursue requests contrary to an ordinance. *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1516 (11th Cir. 1987). Accord, *Herrington v. County of Sonoma,* 834 F.2d 1488, 1494-1496 (9th Cir. 1987), *as amended,* 857 F.2d 567, 569 (9th Cir. 1988).

The opinion speculates that rezoning to commercial could be "consistent" with the designation in the sector plan as residential because *Southwest Ranches* held that a

government need not consider *only* the land use plan. The opinion fails to note Resolution 86-461 which specifically provides here that rezonings must be "consistent *with the land use plan* (see Figure 1 attached)." The speculation also overlooks the constraints the sector plan purports to find on commercial development of Eide's highway properties. Finally, the opinion overlooks the County admission that the sector plan restricts the Eide properties "now and in the future, only for residential purposes" (County memorandum concerning summary judgment at 17).

Apoxsee. Apoxsee (Px3, p. x) provides that "[a]ll development orders [including rezonings]. . . . shall be consistent with the primary components of the Sarasota County Comprehensive Plan." *"Primary components" is defined as including the future land use map* (Px 3, p. ix).

Common sense. The sector plan itself indicates that pursuing commercial zoning of Eide's properties would be futile – it listed as "constraints" on commercial designation their location, their orientation away from the future market area, traffic impacts, the present unavailability of central sewer, their residential, environmental, and archeological value, and their "low potential for commercial land use" (Px 8A). The County argued (and attempted to prove) at trial that commercial use of Mr. Eide's property would be strip zoning (R. 12-53), adversely impact traffic (R. 9-24-26, 40-41, R. 12-53, 63, 68-75), and adversely affect surrounding properties (R. 12-63) (R. 4-22-23, R. 12-48, 68-78). The County argued, and attempted to prove, that residential use was appropriate (R. 4-24, R. 5-7-9, 12, R. 9-43-50, R. 12-65-67, 81). At trial, the County effectively conceded that pursuing

rezoning would be futile: "if developed commercial, [the Eide properties] would push the highway over its designed limits and turn it into a parking lot" (R. 12-71, 73). In light of the foregoing, it would have been "futile" to pursue rezoning to commercial where, as here, the County's position (albeit irrational), prior to the sector plan, during the sector plan, at trial, and on this appeal, has been consistent that the Eide properties cannot be used as commercial.

(3) *There is no need to pursue legislative remedies.* The opinion suggests Eide could petition for an amendment to the comprehensive plan (opinion at 1912).

Judge Castagna repeatedly held that Eide need not pursue amendments to the sector and comprehensive plans because those were legislative remedies (R. 6-83, 128, 129, 130, R. 8-96-98, R. 9-51, 118, 124).

No case law supports the opinion's requirement to pursue legislative remedies.[4] Ripeness cases have always involved *administrative* remedies. The issue in a ripeness case is "how [the agency] will *apply* the regulation at issue," *Williamson County*, 105 S.Ct. 3108, 3119, not whether a legislature will change the legislation.

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[4] See, e.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 188 (1985) ("variances," "administrative action"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) ("administrative relief," "variance," "administrative solutions"); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 (11th Cir. 1987) ("variances"); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 376, 377, 379 (9th Cir. 1988) ("special use permit," "variance," "a permit or variance under a governing land use or zoning ordinance").

If there were a duty to pursue legislative remedies, such as an amendment to the comprehensive plan,[5] a case would never be ripe. One can always attempt to obtain legislative relief. If the legislature refuses to grant certain relief, one can ask for other relief – if the legislature refuses *all* relief, one can ask a partially new legislature next year. Thus, the cases have never required a landowner to pursue a legislative remedy.[6]

(4) *Even if there were a duty to pursue legislative remedies, pursuing those remedies here would have been futile.* Even if Eide had the duty to pursue legislative remedies, pursuing amendments to the comprehensive plan, and then, to the sector plan would have been futile here. It strains credulity to suppose that the County would have amended these plans for Eide's benefit when it had just refused to consider his rezoning petition independently; when the planning commission had just recommended no amendment to the comprehensive plan; and when the County had just gone through the detailed site-specific

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[5] The County conceded at trial that amending the sector plan and the comprehensive plan would be legislative (County's Trial Brief at 13; County's Motion in Limine at 3). Moreover, amending the comprehensive plan "would cost hundreds of thousands of dollars and take several years" (R. 4-110, 111, 112).

[6] See *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573-1576 (11th Cir. 1989); *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483, 1487 (11th Cir. 1988); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Anthony v. Franklin County*, 799 F.2d 681 (11th Cir. 1986); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 873 (1982); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987), *as amended*, 857 F.2d 567 (9th Cir. 1988).

sector planning process to deny Eide commercial designation and affirm that any future commercial zoning, if ever allowed, should be on the other side of the intersection and on the opposite side of the road!

(5) *Because the opinion raises an important question concerning growth management in Florida, this Court should certify the question.* Because the opinion (holding that commercial zoning may be "consistent" with a residential restriction on a site-specific land use map) may undercut Florida's attempts to make plans enforceable, the opinion is particularly important to growth management in Florida. Pursuant to Florida Statutes 25.031, Florida Rule of Appellate Procedure 9.150, and *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), Eide, therefore, would request this Court to certify to the Supreme Court of Florida the following question: May a government rezone property to commercial where the government has just adopted a site-specific sector plan; where the sector plan designates that property as residential; where the sector plan lists various reasons precluding the commercial use of that property; and where the government has just passed a resolution that any rezoning must be consistent with a parcel-specific map designating that property as residential?

(6) *Because Judge Castagna ruled as a matter of law for Eide on ripeness, this Court should remand to Judge Castagna.* As previously noted, the trial court ruled that Eide need not pursue an amendment to the sector or comprehensive plans because they were legislative remedies (R. 6-83, 128, 129, 130, R. 8-98, 99, R. 9-51, 118, 124). Thus, it was neither necessary nor appropriate for Eide to prove that pursuing legislative remedies was futile. If this Court

wants to break new ground to hold that a landowner must pursue legislative remedies, this Court should remand to the trial court to permit Eide to prove that pursuing legislative remedies would have been futile. Justice demands.

Conclusion. This Court should grant rehearing, vacate the opinion of March 8, 1990, and affirm the district court judgment. Alternatively, should this Court find the record insufficient to determine whether pursuing rezoning to commercial would have been futile, this Court should remand to Judge Castagna for an evidentiary hearing where Eide could put on further evidence that was unnecessary once Judge Castagna indicated that he would rule for Eide on ripeness. Finally, because the opinion has the potential to undermine growth management in Florida, this Court should certify the "consistency" question to the Supreme Court of Florida.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to Richard E. Nelson, 2070 Ringling Boulevard, Sarasota, Florida 34237, this 27th day of March, 1990.

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Exhibit A

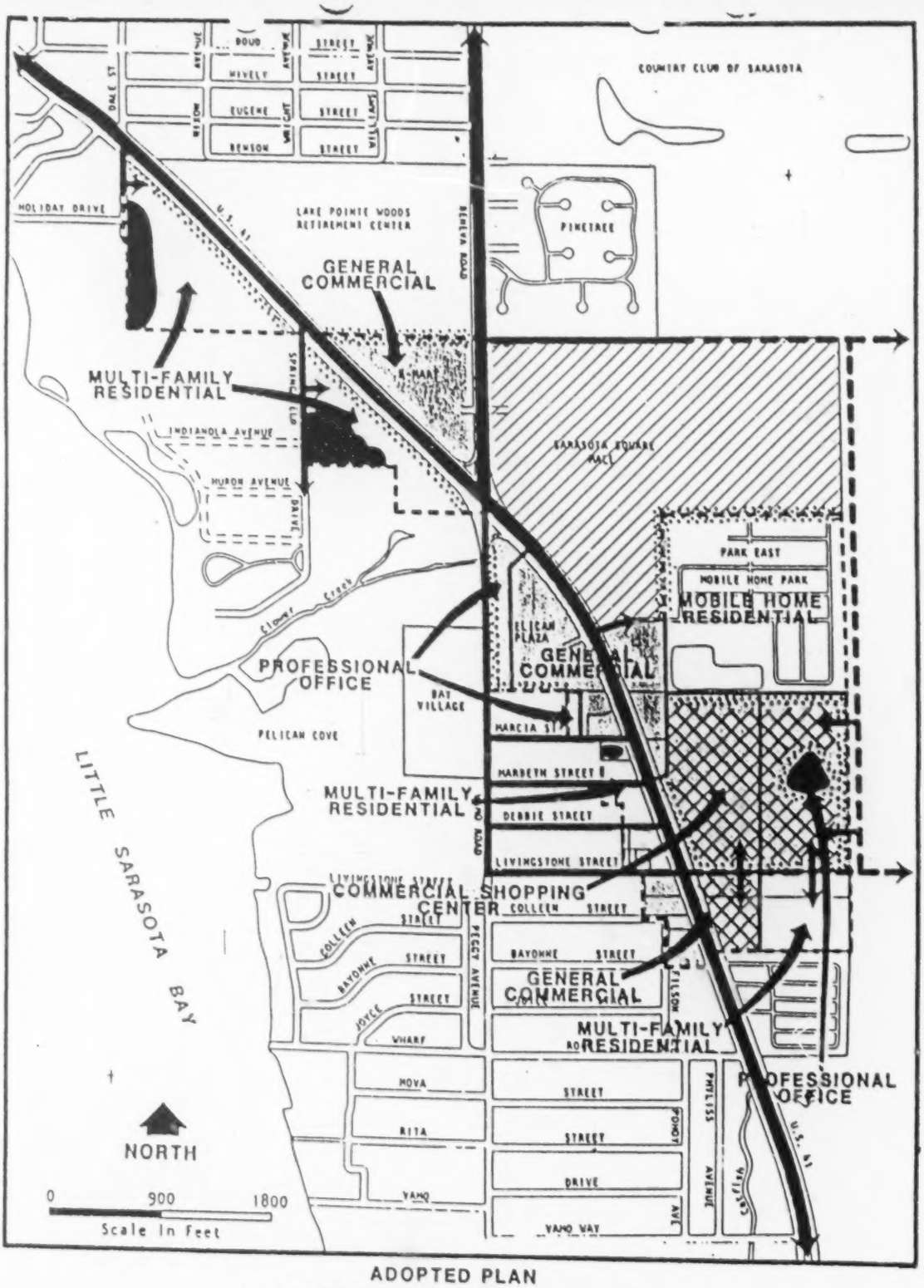
The opinion also errs when it suggests that the 75 acre limit is not a cap; when it suggests that Eide did not submit a rezone petition; and when it characterizes Eide's claim as a "taking" claim.

As for the 75-acre cap, Mr. James, the former County planning director who wrote Apoxsee, testified that the 75 acres was a "cap" (R. 9-73). Mr. Paulman, the County planner who was in charge of the sector plan here, testified at the planning commission hearing that the sector plan would "allocate 75 acres of commercial development . . . the *maximum* allowed for a village activity center" (Px 124, pp. 2-3). The sector plan itself recognizes that "[c]ommercial development beyond the commercial acreage limitation [of 75] would require amendment(s) to the comprehensive plan. . . . " (Px 8A, p. 63, 64).

As for not submitting a rezone application, Eide did submit a *complete, formal, professionally prepared* rezoning petition in collaboration with the would-be developer of his property prior to the adoption of the sector plan. His petition was accepted as complete and not defective as the County has suggested. The adoption of the sector plan in Resolution 86-461 superimposed the traffic analysis. Resolution 86-461 also doomed Eide's rezone petition to commercial because the resolution specifically required that any rezoning be consistent with the site-specific land use map which designated the Eide highway properties as residential.

As for the characterization of Eide's claims as a taking, Eide's federal claims are for due process and equal protection. As the Ninth Circuit has noted in *Herrington v.*

Sonoma County, 834 F.2d 1488, 1498 (9th Cir. 1987), *as amended*, 857 F.2d 567, 569 (9th Cir. 1988), there is a considerable difference. "In order to succeed with a regulatory taking claim, a property owner ordinarily must demonstrate that all or substantially all economically viable use of the property has been denied. . . . In contrast, the Herringtons' due process and equal protection claims do not require proof that all use of their property has been denied." Rather, the Ninth Circuit noted that the issue there was basically whether the County's action was arbitrary.



ADOPTED PLAN

U.S. 41 & GENEVA ROAD VILLAGE ACTIVITY CENTER
SECTOR PLAN #84-2-SP

SECTOR PLAN BOUNDARY

ACTIVITY CENTER

REGIONAL CENTER

TRAFFIC CIRCULATION AND ACCESS PLAN

MAJOR ARTERIALS

LOCAL ROADS

PROPOSED ROADS

POTENTIAL ACCESS

ENVIRONMENTAL MANAGEMENT PLAN

AREAS RECOMMENDED TO BE LEFT IN OPEN SPACE IN NATIVE HABITAT

BUFFER AREAS

POTENTIAL AREAS OF MAJOR TREE REMOVAL

STATE OF FLORIDA)
COUNTY OF SARASOTA)

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN THIS OFFICE, WITNESS MY HAND AND OFFICIAL SEAL THIS DATE 10/2/86.

D. H. HACKNEY, JR., CLERK OF THE CIRCUIT COURT EX-OFFICIO CLERK TO THE BOARD OF COUNTY COMMISSIONERS, SARASOTA COUNTY, FLORIDA

BY: Deputy Clerk

Figure 1

The Fourteenth Amendment provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 (1981) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fla. Stat. § 163.3194 (Supp. 1989)

163.3194 Legal status of comprehensive plan. –

(1)(a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted. . . .

(3)(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. . . .